

05-343 SEP 13 2005

No. :

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In The
Supreme Court of the United States

PERCY STANLEY HARRIS,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

*On Petition for a Writ of Certiorari to the
Court of Special Appeals of Maryland*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Petitioner receive ineffective assistance of trial counsel under the Sixth Amendment where trial counsel failed to interpose an objection based upon the Fifth Amendment prohibition against double jeopardy where the jury returned a final verdict of guilty of second degree murder after being polled and was then permitted to continue to deliberate and returned a verdict of guilty as to first degree murder?

II. Did the Petitioner receive ineffective assistance of postconviction counsel under the Sixth Amendment where postconviction counsel failed to show: (1) special circumstances or lack of waiver with respect to the due process violations alleged in the original postconviction petition; and (2) prejudice to the Petitioner for any of the 16 allegations of ineffective assistance of counsel raised?

III. Did the Petitioner receive ineffective assistance of postconviction counsel under the Sixth Amendment based on the cumulative effect of postconviction counsel's errors?

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THE DECISION OF THE COURT OF SPECIAL APPEALS OF MARYLAND THAT A FINAL VERDICT RENDERED AFTER THE JURY HAS BEEN POLLED AS TO SECOND DEGREE MURDER DOES NOT ACT AS AN IMPLIED ACQUITTAL AS TO FIRST DEGREE MURDER UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IS IN CONFLICT WITH DECISIONS OF THE FIRST, FIFTH AND SEVENTH CIRCUITS AND PRESENTS AN OPPORTUNITY FOR THIS COURT TO CLARIFY THE APPLICATION OF *GREEN V. UNITED STATES*, 355 U.S. 184 (1957) AND

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WHERE IT HELD THAT THE
PETITIONER WAS NOT DENIED HIS
SIXTH AMENDMENT RIGHT TO THE
EFFECTIVE ASSISTANCE OF
POSTCONVICTION COUNSEL BASED
ON POSTCONVICTION COUNSEL'S
FAILURE TO SHOW: (1) SPECIAL
CIRCUMSTANCES OR LACK OF
WAIVER WITH RESPECT TO THE DUE
PROCESS VIOLATIONS ALLEGED IN
THE ORIGINAL POSTCONVICTION
PETITION; AND (2) PREJUDICE TO
THE PETITIONER FOR ANY OF THE
16 ALLEGATIONS OF INEFFECTIVE
ASSISTANCE OF COUNSEL RAISED.
IN BOTH CIRCUMSTANCES, THE
PETITIONER'S POSTCONVICTION
COUNSEL'S UTTER FAILURE TO
PROPERLY PLEAD THE ERRORS
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THAT PREJUDICED THE PETITIONER
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THE COURT OF SPECIAL APPEALS OF
MARYLAND MISAPPLIED THE
DECISION IN STRICKLAND V.
WASHINGTON, 466 U.S. 668 (1984),
WHERE IT HELD THAT THE
PETITIONER WAS NOT DENIED HIS
SIXTH AMENDMENT RIGHT TO THE

EFFECTIVE ASSISTANCE OF POSTCONVICTION COUNSEL EVEN IF NONE OF THE OTHER MULTIPLE SERIOUS ATTORNEY ERRORS COMMITTED BY POSTCONVICTION COUNSEL WERE SUFFICIENT, INDIVIDUALLY, TO PROVIDE POSTCONVICTION RELIEF, WHERE THE CUMULATIVE EFFECT OF THE SERIOUS ATTORNEY ERRORS OF POSTCONVICTION COUNSEL, IN FAILING TO POSTCONVICT TRIAL COUNSEL AND/OR APPELLATE COUNSEL FOR THE CUMULATIVE EFFECT OF HIS SERIOUS ATTORNEY ERRORS, ENTITLED THE PETITIONER TO RELIEF	24, 25
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OPINIONS AND ORDERS BELOW

The opinion of the Court of Special Appeals of Maryland affirming the denial of the Petitioner's motion to reopen his postconviction petition is reported at 160 Md.App. 78, 862 A.2d 516 (2004) and is included in the Appendix at 1a-36a. The Memorandum, Opinion and Order of the Court of the Circuit Court for Prince George's County, Maryland denying the Petitioner's request for postconviction relief is included in the Appendix at 37a-46a. The Memorandum and Order of Court of the Circuit Court for Prince George's County, Maryland denying the Petitioner's motion to reopen his postconviction is included in the Appendix at 47a-48a. The Order of the Court of Appeals of Maryland denying the Petitioner's petition for a writ of certiorari is reported at 386 Md. 181, 872 A.2d 47 (2005) and is included in the Appendix at 49a. The Order of the Court of Appeals of Maryland denying the Petitioner's motion for reconsideration was filed June 17, 2005 and is included in the Appendix at 50a.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on December 6, 2004. On April 8, 2005, the Court of Appeals of Maryland denied certiorari. On June 17, 2005, the Court of Appeals of Maryland denied the Petitioner's motion for reconsideration.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime,

unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Proceedings Below

On April 11, 1988, the body of Lyndetta Mickles of Baltimore was discovered in Watkins Park in Prince George's County, Maryland. An autopsy revealed that she had been shot in the head and shoulder with a .44 caliber pistol. On April 14, 1988, the Petitioner was charged, in the Circuit Court for Prince George's County,

with first-degree murder, second-degree murder, and the use of a handgun in the commission of a crime of violence in connection with Lyndetta's death. The Petitioner originally went to trial on May 7, 1990. The trial ended in a hung jury on May 16, 1990. App. 3a.

Petitioner's second trial began on November 1, 1990. The case was sent to the jury for deliberation on November 9, 1990. App. 3a, 7a. After many hours, the jurors sent a note saying that they had reached a verdict on two of the three charges. The court asked defense counsel if he had advised the Petitioner about the situation, to which defense counsel responded:

I have advised my client the jury has reached a verdict on two of the three counts. I have advised him let's go ahead and bring it in so we'll know probably what the verdict is so bring it in. I know we have a right to insist on a verdict on all three counts but I think we'll just take it.

The jury was brought into the courtroom and returned guilty verdicts on the charges of second-degree murder and use of a handgun in the commission of a crime of violence. The judge asked defense counsel whether he wanted to have the jury polled on those counts, and defense counsel responded in the affirmative. The jurors were polled. The court then asked the jurors whether they thought a consensus as to the first-degree murder charge was reachable, to which the foreman responded, "the consensus was we cannot." The court explained that it could not accept that outcome and directed the jurors to deliberate further. App. 7a-8a.

Defense counsel objected to the court's instruction on the ground that it was an impermissible "*Allen* charge."¹ He did not object to the court's decision to have

¹ *Allen v. United States*, 164 U.S. 492 (1896).